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## Cascadia Wildlands v. Bureau of Indian Affairs

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***Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105 (9th Cir. 2015)**

**Hannah R. Seifert**

*Cascadia Wildlands v. Bureau of Indian Affairs* exemplifies the discretion agencies enjoy when determining how to organize and present information in environmental assessments. In a case of first impression, the court relaxed the extent of analysis necessary to comply with NEPA by allowing reasonably foreseeable future projects to be aggregated with past projects. Additionally, the court permitted the BIA to circumvent the FWS's Recovery Plan for the northern spotted owl by holding that the CRA was subject only to the standards and guidelines of federal forest plans, not specific recovery plans.

## I. INTRODUCTION

At issue in *Cascadia Wildlands v. Bureau of Indian Affairs* was whether the Bureau of Indian Affairs's ("BIA") approval of the Middle Forks Kokwel timber sale ("Kokwel Project") violated the National Environmental Policy Act ("NEPA") and the Coquille Restoration Act ("CRA").<sup>1</sup> *Cascadia Wildlands*, Oregon Wild, and Umpqua Watersheds (collectively "Cascadia") challenged the approval, arguing that the Kokwel Project (1) violated NEPA for failing to consider cumulative environmental impacts in light of a previously approved timber harvest in the Coquille Forest, and (2) impermissibly conflicted with the United States Fish and Wildlife Service's ("FWS") Recovery Plan for the northern spotted owl.<sup>2</sup> The United States Court of Appeals for the Ninth Circuit affirmed the United States District Court for the District of Oregon's order granting summary judgement in favor of the BIA and Coquille Indian Tribe ("Tribe"), ultimately deferring to agency and congressional discretion on both issues.<sup>3</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

*Cascadia Wildlands v. Bureau of Indian Affairs* arose from the BIA's approval of the Kokwel Project, under which the Tribe planned to harvest 268 acres of timber in the Coquille Forest.<sup>4</sup> The Coquille Forest comprises 5,410 acres of land in southwest Oregon restored to the Tribe in 1996 through an amendment to the CRA.<sup>5</sup> The CRA restored a portion of ancestral lands to the Tribe and established a plan for economic development on those lands.<sup>6</sup> Pursuant to the CRA,

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<sup>1</sup> *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1107-08 (9th Cir. 2015) [hereinafter *Cascadia Wildlands II*]; see Coquille Restoration Act, Pub. L. 101-42, 103 Stat. 91, (June 28, 1989) (codified at 25 U.S.C. §§ 715-715h (2012)).

<sup>2</sup> *Cascadia Wildlands II*, 801 F.3d at 1107-08.

<sup>3</sup> *Id.* at 1114-15.

<sup>4</sup> *Id.* at 1108.

<sup>5</sup> *Id.*; see also 25 U.S.C. § 715c.

<sup>6</sup> *Cascadia Wildlands v. Bureau of Indian Affairs*, No. 6:13-cv-1559-TC, 2015 WL 2872008, at \*7-8 (D. Or. Mar. 19, 2014) [hereinafter *Cascadia Wildlands I*].

the Coquille Forest is held in trust by the federal government and managed by the Secretary of the Interior for the benefit of the Tribe.<sup>7</sup>

Cascadia's objections implicated the BIA's approval of two separate timber harvests in the Coquille Forest. In 2011, prior to the Kokwel Project, the BIA approved the Alder/Rasler Project, which consisted of 270 acres of regeneration harvest, fifty-two acres of density management, and fifty-six acres of commercial thinning.<sup>8</sup> The Alder/Rasler Project was intended to "generate money for the Tribe and manage forest growth."<sup>9</sup> Prior to approval, the BIA and the Tribe conducted an Environmental Assessment ("EA") of the Alder/Rasler Project area and found that while the Alder/Rasler Project would create jobs and raise revenue, it also would likely adversely affect the northern spotted owl.<sup>10</sup> Despite this potential adverse effect, the BIA issued a Finding of No Significant Impact ("FONSI") and approved the project without conducting an Environmental Impact Statement ("EIS"). The BIA based its decision on the EA's finding that no occupied northern spotted owl habitats existed within the project area and that no northern spotted owl nest sites were located within one-and-a-half miles of the project area.<sup>11</sup>

In 2013, the BIA approved the Kokwel Project, which consisted of an additional 221 acres of commercial thinning and forty-two acres of density management on lands adjacent to, and overlapping with, the Alder/Rasler Project.<sup>12</sup> The BIA found that the Kokwel Project would (1) provide vital funding to the Tribe and (2) enhance and maintain the biological diversity and ecosystem health of the Coquille Forest.<sup>13</sup> The FWS performed a Biological Assessment and determined the Kokwel Project "likely would adversely affect the northern spotted owl, and would 'take' up to 14 northern spotted owls at four sites."<sup>14</sup> Despite a determination at odds with the northern spotted owl Recovery Plan, the FWS found the habitat loss would not significantly impact the northern spotted owl or jeopardize its existence.<sup>15</sup> Subsequently, the Kokwel Project EA concluded that the cumulative effects from the Kokwel Project and other foreseeable projects would not appreciably diminish suitable northern spotted owl habitat and, despite a seven-percent reduction in habitat, the overall habitat would benefit from the Kokwel Project.<sup>16</sup> Similar to its decision in the Alder/Rasler Project, the BIA issued a FONSI approving the Kokwel Project without conducting an EIS.<sup>17</sup>

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<sup>7</sup> *Cascadia Wildlands II*, 801 F.3d at 1108; *see also* 25 U.S.C. § 715c(b), (d)(5).

<sup>8</sup> *Cascadia Wildlands II*, 801 F.3d at 1108.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Cascadia Wildlands I*, 2015 WL 2872008, at \*2.

<sup>14</sup> *Cascadia Wildlands II*, 801 F.3d at 1109.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1110.

<sup>17</sup> *Id.*

Cascadia filed suit to enjoin the Kokwel Project.<sup>18</sup> The Tribe intervened as an additional defendant.<sup>19</sup> Without reaching the issue of injunction, the district court granted the BIA's motion for summary judgment, finding that (1) the proposed Project did not violate the CRA because the FWS's Recovery Plan for the spotted owl was not binding,<sup>20</sup> and (2) that the Kokwel EA appropriately aggregated the impacts of the Alder/Rasler project into its baseline condition.<sup>21</sup> The Ninth Circuit affirmed the district court's order.<sup>22</sup>

### III. ANALYSIS

#### A. NEPA Permits Aggregation of Reasonably Foreseeable Future Action

Cascadia first claimed that the BIA violated NEPA by failing to adequately consider the Kokwel Project's cumulative impacts in light of the Alder/Rasler Project.<sup>23</sup> NEPA facilitates agency procedures to ensure environmental considerations are given a "hard look."<sup>24</sup> NEPA requires the preparation of an EIS for "major federal actions significantly affecting the quality of the human environment."<sup>25</sup> The EA, a "concise public document" containing relevant evidence and analysis, often serves as a precursor to an EIS; in some instances, an EA reveals the environmental impacts of a proposed action are not significant enough to warrant an EIS.<sup>26</sup> More specifically, NEPA directs agencies to consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts."<sup>27</sup> It is well-established that an agency may satisfy NEPA by "aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured."<sup>28</sup>

Cascadia maintained that, while the cumulative impact of past actions may be aggregated, NEPA does not permit the aggregation of a reasonably foreseeable future action—here, the Alder/Rasler Project.<sup>29</sup> The court, deferring to agency expertise, rejected Cascadia's interpretation, and found that NEPA does not explicitly require individual discussion in an EA of the impacts of reasonably foreseeable actions.<sup>30</sup> Rather, the court determined that as long as the agency

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<sup>18</sup> *Cascadia Wildlands I*, 2015 WL 2872008, at \*3.

<sup>19</sup> *Cascadia Wildlands II*, 801 F.3d at 1108 n.1.

<sup>20</sup> *Cascadia Wildlands I*, 2015 WL 2872008, at \*6.

<sup>21</sup> *Id.* at \*9.

<sup>22</sup> *Cascadia Wildlands II*, 801 F.3d at 1115.

<sup>23</sup> *Id.* at 1110.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1111; *see also* 42 U.S.C. § 4332(2)(c).

<sup>26</sup> *Cascadia Wildlands II*, 801 F.3d at 1111; *see also* 40 C.F.R. § 1508.9 (2015).

<sup>27</sup> *Cascadia Wildlands II*, 801 F.3d at 1111 (quoting 40 C.F.R. § 1508.27(b)(7)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1112; *see also* 40 C.F.R. § 1508.7 (defining "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.")

clearly considers the cumulative impact of the action, whether past, present, or future, the EA is in compliance with NEPA.<sup>31</sup> Under this framework, the court held that the Kokwel Project EA properly identified the Alder/Rasler Project as a reasonably foreseeable project to be considered in the baseline analysis.<sup>32</sup>

In the alternative, Cascadia argued that the Kokwel Project EA did not actually aggregate the impacts of the Alder/Rasler Project.<sup>33</sup> The court disagreed, finding that the Kokwel Project EA set forth sufficient explanation detailing how it measured the impacts of the Kokwel Project against a baseline encompassing the Alder/Rasler Project.<sup>34</sup> While commenting that the Kokwel Project EA's explanation of methodology could have been clearer, the court agreed it would be redundant and unnecessary to specifically state each time the Alder/Rasler Project was considered.<sup>35</sup> Since the Kokwel Project EA properly incorporated the Alder/Rasler Project into the baseline against which cumulative impact could be measured, the court determined that summary judgement in BIA's favor was proper.<sup>36</sup>

#### *B. CRA Does Not Mandate Compliance With Coos Bay Plan*

Cascadia also urged that the Kokwel Project violated the CRA because it was inconsistent with the FWS's Recovery Plan for the northern spotted owl, which requires management of the Coquille Forest pursuant to the standards and guidelines of federal forest plans.<sup>37</sup> The Coos Bay District Resource Management Plan ("Coos Bay Plan") is a federal forest plan with the objective to protect, manage, and conserve the northern spotted owl.<sup>38</sup> Cascadia argued that the word "objective" in the Coos Bay Plan equates to the CRA's "standards and guidelines," rendering compliance with the FWS Recovery Plan mandatory.<sup>39</sup>

The court held that the CRA does not require adherence to the Coos Bay Plan's objective of compliance with recovery plans for three reasons. First, the Coos Bay Plan expressly established an objective, while the CRA used standards and guidelines.<sup>40</sup> The court stated that if Congress had intended to require the CRA to comply with the Coos Bay Plan objectives, it would have done so expressly.<sup>41</sup> Second, the Northwest Forest Plan ("NFP") expressly established "standards and guidelines" related to the northern spotted owl and encompassed the Coquille Forest, which suggested to the court that Congress did not intend such terms to be used generically.<sup>42</sup> Finally, since the Coos Bay Plan's definition of "objectives"

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<sup>31</sup> *Cascadia Wildlands II*, 801 F.3d at 1112.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1113.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1113-14.

<sup>36</sup> *Id.* at 1114.

<sup>37</sup> *Id.* at 1114; *see also* 25 U.S.C. § 715c(d)(5).

<sup>38</sup> *Cascadia Wildlands II*, 801 F.3d at 1114.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1114-15.

<sup>42</sup> *Id.* at 1115.

was substantially broader than the NFP’s definition of “standards and guidelines,” the court determined that the terms were not interchangeable.<sup>43</sup> The court concluded that because the CRA did not require adherence to the Coos Bay Plan’s objective of compliance with recovery plans, the Kokwel Project did not violate the CRA.<sup>44</sup>

#### IV. CONCLUSION

The central issue in *Cascadia Wildlands v. Bureau of Indian Affairs*—aggregation of future action—was a matter of first impression in the Ninth Circuit. While deference to agency discretion is not particularly significant, the Ninth Circuit’s holding that a reasonably foreseeable future action may be aggregated with the cumulative effects of past and present projects into the environmental baseline is of precedential importance. Aggregating the effects of reasonably foreseeable future actions may reduce redundancy within NEPA review at the cost of a more thorough, detailed analysis. Further, this case highlights deference to the CRA in light of coexistent federal forest plans.

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*